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No. 93-98

IN THE

Supreme Court of the United States

October Term, 1993

MARY A. ROBB,
Petitioner,

vs.

ELECTRONIC DATA SYSTEMS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF ELECTRONIC DATA SYSTEMS CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Circuit Court properly affirm the trial court's resolution of the issue of pretext on summary judgment in an action brought under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.*?

2. Did the Circuit Court properly affirm the trial court's holding that Petitioner had not established a genuine issue of material fact on the issue of pretext in this age discrimination case?

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BRIEF OF ELECTRONIC DATA SYSTEMS CORPORATION IN OPPOSITION

STATEMENT OF THE CASE

This age discrimination case was initiated on July 5, 1990, when Petitioner Mary A. Robb ("Petitioner") filed a Complaint in the United States District Court for the Northern District of Texas against her former employer, Respondent Electronic Data Systems Corporation ("EDS"). In that Complaint, Petitioner alleged that EDS

violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.* ("ADEA") by eliminating her position and terminating her employment on account of her age (R. Vol. I at 1-4). EDS timely filed an answer denying this allegation and the parties engaged in extensive discovery (R. Vol. I at 5).

Following the close of discovery, EDS filed a Motion for Summary Judgment (R. Vol. I at 68-76). Thereafter, this case was transferred to Judge Jorge A. Solis (R. Vol. I at 123). Pursuant to Court Order, EDS refiled its Motion for Summary Judgment and Supporting Materials on November 22, 1991 (R. Vol. I at 133; Vol. IV). Petitioner filed an extensive 23-page Response to that Motion on December 16, 1991 (R. Vol. I at 192), and EDS filed a Reply Brief on January 14, 1992 (R. Vol. I at 246).

On September 4, 1992, the District Court issued a Memorandum Opinion and Order granting EDS' Motion for Summary Judgment (R. Vol. II at 357-378).[1] In a detailed, scholarly opinion, the Court held that Petitioner failed to raise a genuine issue of material fact as to whether EDS' articulated reason for eliminating Petitioner's position—that the nature of the work in her department changed over time such that her services were no longer needed—was actually a pretext for age discrimination (R. Vol. II at 377). Thus, the District Court concluded that EDS was entitled to judgment as a matter of law.

Petitioner filed a timely Notice of Appeal of the District Court's Order with the Fifth Circuit Court of Appeals. Both parties submitted thorough briefs

[1] The opinion of the District Court is reproduced in Appendix A of Petitioner's *Petition for Writ of Certiorari*.

reflecting their respective positions. On April 16, 1993, in an unpublished opinion, the Fifth Circuit affirmed the District Court's decision.[2]

In that decision, finding that no injustice to Petitioner would result, the Fifth Circuit declined to consider Petitioner's new argument that pretext was evidenced by EDS' failure to follow its own internal transfer system because Petitioner had not presented that issue to the District Court. Additionally, the Court affirmed the trial court's findings that Petitioner otherwise had not come forward with competent evidence establishing an issue of fact as to whether EDS' reasons for terminating Petitioner were merely a pretext for age discrimination. Finally, the Court specifically rejected Petitioner's argument that, as a general proposition of law, the issue of pretext may not be resolved on summary judgment. Following that decision, Petitioner filed her *Petition for Writ of Certiorari* on July 15, 1993.

The underlying facts leading to this *Petition* are as follows. EDS is a Dallas-based company which provides data processing, consulting and other information technology services to business customers throughout the world. Petitioner Mary A. Robb was hired by EDS on October 22, 1984 (R. Vol. I at 1). At that time, she was 49 years old (R. Vol. III at 11).

Petitioner began her employment with EDS as an Administrative Assistant in the Financial Services Department (R. Vol. III at 12). After serving in that position for over three years, Petitioner obtained a transfer to EDS' Productivity Services Department as an Assistant Industrial Engineer (R. Vol. III at 13).

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[2] The Fifth Circuit Court of Appeals decision is reproduced in Appendix C of the *Petition for Writ of Certiorari.*

The basic function of the EDS Productivity Services Department was to study the productivity of EDS' business customers and make detailed recommendations to those customers outlining ways to improve their productivity (R. Vol. I at 104, 112, 118). During Petitioner's tenure in the Productivity Services Department, it was divided into three separate teams which were vertically aligned to separate industries supported by EDS—Insurance, Corporate, and Finance (*Id.*). Upon Petitioner's transfer to the Productivity Services Department she was assigned to the Insurance Team, which was managed by Darell Herbst, who was 46 years old at the time (R. Vol. I at 103). During all times relevant to this lawsuit, Mr. Herbst managed the Insurance Team but did not have any managerial authority over the Corporate or Finance Teams (*Id.*).

As the name suggests, the Insurance Team supported EDS' customers in the insurance industry. This support primarily consisted of conducting productivity improvement studies of the customers' business. Following these studies, the Insurance Team would generate a formal report that contained recommendations as to how the customer could improve productivity to achieve cost savings and a more productive business environment (R. Vol. I at 104).

Throughout Petitioner's tenure in the Productivity Services Department, the Insurance Team was comprised of a number of professional Industrial Engineers ("I.E.'s"), an I.E. Supervisor and one Assistant I.E., Mary Robb (R. Vol. I at 104; *see also* R. Vol. I at 109).[3]

[3] The Corporate Team and the Finance Team were organized in a similar fashion (*See* R. Vol. I at 115). The Assistant I.E. for the Corporate Team was Rosalynn Ford, and the Assistant I.E. for the Finance Team was Penny Welch (R. Vol. I at 112, 115, 118).

Robb's responsibilities as the Assistant I.E. for the Insurance Team were to assist the I.E.'s by helping them generate reports and proposals and by assisting in research, among other tasks. The primary aspect of Robb's position was the preparation of these formal reports for the insurance customers (R. Vol. I at 105, III at 131).

Unfortunately, shortly after assuming her new role as Assistant I.E. to the Insurance Team, Petitioner began experiencing problems in interacting with the I.E.'s she was assigned to support. These problems led Petitioner to ask Herbst if she could seek a transfer out of the Productivity Services Department. Herbst approved this request and authorized Petitioner to access EDS' internal transfer system in July of 1988 (R. Vol. III at 21-22, 155). However, Petitioner's problems with her co-workers continued, forcing Herbst to meet with Petitioner on August 18, 1988, and place her on a written performance improvement plan (R. Vol. III at 145, 151). This plan was designed to address Petitioner's interpersonal problems and improve her performance to an acceptable level (*Id.*). Specifically, Robb was provided with two months to develop a more positive attitude and improve her apparent inability to work effectively with the I.E.'s she was assigned to support (*Id.*). Pursuant to EDS policy, Herbst also removed Petitioner from the EDS internal transfer system because she had been placed on the performance improvement plan (R. Vol. III at 23).

Thereafter, Petitioner successfully completed the terms of her performance plan and was given a performance evaluation by Herbst on October 26, 1988.

As a result of that evaluation, Herbst gave Petitioner a rating of "solid generally meets" (R. Vol. III at 149).[4]

About three months later (in early February of 1989), Petitioner again approached Herbst to seek permission to transfer, and Herbst granted this request (R. Vol. III at 140-41). For the next several months, Petitioner sought a transfer within EDS' internal transfer system but was unable to locate another position.[5]

In the early part of 1989, the Insurance Team experienced significant changes in the nature of its work which essentially involved replacing productivity-related work (the preparation of reports by the I.E.'s with the support of the Assistant I.E.) with implementation-related work (carrying out the recommended business changes for the customer). Stated differently, instead of generating numerous large reports and proposals for recommended action to be taken by its customers, the Insurance Team assumed the responsibility for actually implementing the business improvements it suggested (R. Vol. I at 104-05). These changes resulted in more work that the I.E.'s were required to handle themselves, but reduced work that would ordinarily be delegated to the Assistant I.E. inasmuch as a formal, final report of recommendations was no longer required. The reports that were submitted pursuant to the Insurance Team's implementation activities needed little preparation (*Id.*).

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[4] EDS utilizes a performance rating system consisting of seven levels, ranging from "new to job" to "exceptional". "Solid generally meets" is the third lowest of the seven possible ratings ("new to job" and "marginal" are the only two ratings which are lower) (R. Vol. III at 149-150).

[5] EDS has an internal transfer system whereby available jobs are listed on a computer screen for viewing by employees seeking a transfer within EDS.

Preparation of formal, final recommendation reports was an important aspect of the Assistant I.E. position (R. Vol. I at 105; Vol. III at 131). Consequently, the Insurance Team's need for the Assistant I.E. was substantially diminished (R. Vol. I at 105).

The Insurance Team charged its customers for the services it provided. Members of the Team were expected to bill approximately 80 percent of each team member's work time to the customer. As a result of the shift from the recommendation function to the implementation function and the attendant changes in the responsibilities of the Assistant I.E., EDS was only able to bill less than 25 percent of Petitioner's work time during 1989 (R. Vol. I at 105).

The two other teams in the Productivity Services Department, the Finance Team and the Corporate Team, did not experience similar changes in the nature of their work during 1989. They continued to perform the same functions as they had been performing and the I.E.'s in those groups continuing to fully utilize thei Assistant I.E.'s, Penny Welch and Rosalynn Ford (R. Vol. I at 112-13; 118-19).

As a direct consequence of the dramatically reduced need for an Assistant I.E. on the Insurance Team, Herbst decided to eliminate that position in August of 1989 (R. Vol. I at 105). Accordingly, on August 25, 1989, Herbst notified Petitioner that her position would be eliminated effective September 30, 1989, and that she would need to find another position by that time either within or outside EDS (*Id.*). Though Herbst knew that neither the Corporate or the Finance Team had a need for another Assistant I.E., he was hopeful that Petitioner would be able to obtain another position within EDS (R. Vol. I at 105-06, 113, 119).

Thereafter, Herbst actively attempted to help Petitioner obtain another position within EDS. He contacted EDS' Internal Transfer Department but was advised that Petitioner was ineligible to participate in the internal transfer system because she had been in the system within the past six months (R. Vol. I at 106; Vol. III at 155). Pursuant to this policy, he did not authorize Petitioner to formally enter into the internal transfer system, but he provided Petitioner with access to the system by viewing the positions listed in the system himself and allowing Petitioner to review the list of openings and pursue any position for which she thought she was qualified [6] (R. Vol. I at 106; Vol. III at 77-78). Petitioner took advantage of this opportunity by reviewing the list and jotting down the names of the managers over the positions in which she was interested (R. Vol. III at 77-80). Herbst also set up an interview for Petitioner for a job opening in EDS' Technical Products Division, but Petitioner was not offered that position (R. Vol. III at 76-77).

During the August 25 meeting, Herbst also advised Petitioner that she would be excused from work (with pay) whenever she felt it was necessary to pursue any internal or external job opportunities (R. Vol. I at 106). Thereafter, when it became apparent that Petitioner's job search had not been successful, Herbst advised Petitioner that she did not have to come into work at all during the last two weeks of September so that she could fully concentrate on her efforts to obtain another position (R. Vol. I at 106). Unfortunately, Petitioner was

[6] Though EDS generally requires that the manager (rather than the employee) contact the hiring manager for job openings listed in the internal transfer system, Mr. Herbst allowed Petitioner to contact the managers directly in an effort to streamline her job search (R. Vol. III at 79-80). Robb only contacted two of these managers (R. Vol. I at 232-33, ¶22).

unable to secure a position by September 30. Accordingly, Herbst terminated Petitioner on that date (*Id.*). At that point, the position of Administrative I.E. on the Insurance Team was eliminated and Petitioner has not been replaced (R. Vol. I at 106-7, 110).

In anticipation of her pending job elimination on September 30, 1989, Petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission on September 13, 1989, alleging that EDS engaged in age discrimination by eliminating her position (R. Vol. III at 157). She filed an amended charge on September 19, 1989 (R. Vol. III at 158). The amended charge was still under investigation when Petitioner filed the present lawsuit on July 5, 1990, which ended the agency's investigation.

SUMMARY OF ARGUMENT

This case is a garden variety age discrimination lawsuit. The Fifth Circuit's opinion does not present a conflict among the Circuit Courts of Appeal, despite Petitioner's efforts to manufacture one. Additionally, the opinion does not present important questions of federal or constitutional law. Rather, in simplest terms, this appeal represents nothing more than Petitioner's final effort to avoid her failure to gather sufficient evidence of pretext at the trial court level to overcome EDS' Motion for Summary Judgment.

Relying upon a stray quote from a Third Circuit Court of Appeals decision, Petitioner first seeks to invoke this Court's review based on the novel theory that, in age discrimination lawsuits, the issue of pretext may not be resolved on summary judgment as a matter of law. Unfortunately, this bold proposition of law is belied by numerous decisions by the various Circuit Courts of Appeal and is directly contrary to this Court's interpretation of Rule 56 of the Federal Rules of Civil Procedure. In fact, even the Third Circuit Court of Appeals itself has explicitly rejected the very proposition upon which Petitioner bases her request for review. Therefore, Petitioner's misguided proposition of law does not justify full review by this Court.

Likewise, Petitioner's suggestion that review is warranted because the Fifth Circuit Court of Appeals incorrectly affirmed the trial court's holding that Petitioner did not establish a genuine issue of pretext is similarly unavailing. Simply put, this Court need not expend its limited resources on an appeal that is of no interest to anyone other than the parties involved. Moreover, Petitioner is simply wrong in asserting that she has come forward with sufficient evidence to warrant a jury trial in this case. Thus, Petitioner has not established grounds for further review of this case, and her *Petition* should be denied.

ARGUMENT

I. The Fifth Circuit Court Of Appeals Correctly Ruled That The Issue Of Pretext May Be Resolved On Summary Judgment.

Age discrimination lawsuits are evaluated under the traditional *McDonnell Douglas Corp. v. Green*[7] burden shifting analysis. *See Hazen Paper Co. v. Biggins*, _____ U.S. _____, 61 USLW 4323 (1993). Under that analysis, a *prima facie* case of discriminatory discharge under the ADEA requires the plaintiff to show that:

1. She was over 40 years of age;

2. She was discharged;

3. She was qualified for the position she held, and

4. After her discharge, the employer filled the position with someone sufficiently younger to permit an inference of age discrimination.

See McDonnell Douglas Corp. at 802.

In a reduction in force case such as this one, the third and fourth elements are modified to make them appropriate for the circumstances. The modified elements are that:

3. The plaintiff was qualified to assume another position with the employer; and

4. There is evidence from which a fact finder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue.

See e.g., Amburgey v. Corhart Refractories Corp., Inc., 936 F.2d 805, 815 (5th Cir. 1991).

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[7] 411 U.S. 792 (1973).

In the event that the plaintiff establishes a *prima facie* case and thereby meets her initial burden of production, the employer must then articulate a nondiscriminatory reason for its actions. *Texas Dep't. of Community Affairs v. Burdine,* 450 U.S. 248, 254 (1981). This burden is not onerous. *Id.*

After this burden of production is met, the plaintiff must demonstrate that the employer's stated reasons for its action were actually a pretext for illegal age discrimination. *Burdine,* 450 U.S. at 253. While the burden of production shifts from the plaintiff to the defendant and back to the plaintiff, the burden of persuading the fact finder that *intentional* discrimination exists always remains with the plaintiff. *See e.g., St. Mary's Honor Center v. Hicks,* _____ U.S. _____, 61 USLW 4782, 62 FEP Cases (BNA) 96 (June 25, 1993); *U.S. Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 714-716 (1983); *Burdine,* 450 U.S. at 253.

In meeting this ultimate burden, this Court has recently clarified that "a reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown both that the reason was false, and that discrimination was the real reason." *Hicks,* 62 FEP at 102 (emphasis original). Thus, "[i]t is not enough . . . to *dis*believe the employer; the fact finder must *believe* the plaintiff's explanation of intentional discrimination." *Id.* at 104 (emphasis original). Moreover, as noted by several Circuit Courts of Appeal, "a plaintiff whose employment position is eliminated in a corporate reorganization or work force reduction carries a heavier burden in supporting charges of discrimination than does an employee discharged for other reasons." *Wilson v. Firestone Tire & Rubber Co.,* 932 F.2d 510, 517 (6th Cir. 1991); *Accord Aungst v. Westinghouse Electric Corp.,* 937 F.2d 1216, 1220-21 (7th Cir. 1991).

Applying this analysis to the facts presented in this case, the lower courts found, and Petitioner apparently concedes, that EDS proffered a legitimate non-discriminatory reason for Petitioner's termination. The lower courts also concluded that Petitioner had not come forward with sufficient evidence that EDS' decision was merely a pretext for illegal age discrimination to withstand EDS' Motion for Summary Judgment. Thus, it is solely the resolution of that issue Petitioner challenges in this appeal.

In a disingenuous attempt to manufacture a split in the Circuit Courts of Appeal, Petitioner relies on a selectively excerpted quote from the Third Circuit Court of Appeal's decision in *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 901 (3rd Cir. 1987), *cert. dismissed*, 483 U.S. 1052 (1987), for the dubious proposition that the issue of pretext may never be resolved on summary judgment because "an analysis of the pretext issue involves determinations of credibility." (*Petition for Writ of Certiorari*, p. 15). Petitioner is simply wrong. Indeed, even the Third Circuit Court of Appeals itself has expressly rejected the very proposition Petitioner asks this Court to adopt.

In *Healy v. New York Life Ins. Co.*, 860 F.2d 1209 (3rd Cir. 1988), *cert. denied*, 490 U.S. 1098 (1989), the Third Circuit upheld summary judgment for the employer in an age discrimination lawsuit resulting from a reduction in force. In holding that the employee had not established pretext, the Court plainly held that *Chipollini* does not preclude the resolution of the issue of pretext on summary judgment:

> We emphasize that, despite the breadth of the language in *Chipollini*, discrimination cases are inherently fact-bound. Certainly *Chipollini* does not

> stand for the proposition that summary judgment is *never* available in discrimination actions. Rather, we understand the teaching of *Chipollini* to be that where plaintiffs proffer evidence of pretext and create a genuine issue of material fact as to the credibility of the employer's 'legitimate' business reasons, summary judgment is foreclosed.

Id. at 1219 (emphasis added). Thus, Petitioner has been betrayed by the very Circuit Court of Appeals she champions in asserting that the Fifth Circuit erred in affirming summary judgment in this case.

Petitioner's reliance on the Eighth Circuit Court of Appeals' decision in *Haglof v. Northwestern Rehabilitation*, 910 F.2d 492 (8th Cir. 1990) is similarly misplaced. First, the Court's decision in that case did not foreclose resolution of the pretext issue on summary judgment. Rather, it merely cautioned the use of summary judgment in discrimination cases. *Id.* at 495. Additionally, because the *Haglof* decision held that pretext may be established only by discrediting the employer's proffered legitimate reasons for the job action, it is doubtful that *Haglof* survives this Court's recent decision in *Hicks*. Finally, the Eighth Circuit has not hesitated to uphold summary judgment in age discrimination cases where the plaintiff had failed to come forward with evidence establishing pretext. *See e.g., Goetz v. Farm Credit Services*, 927 F.2d 398 (8th Cir. 1991).

Indeed, numerous Circuit Courts of Appeals decisions have upheld the resolution of the issue of pretext on summary judgment where, as in this case, the plaintiff failed to provide competent evidence creating a genuine issue for trial. *See Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5 (1st Cir. 1990); *Bovers v. Flying Tiger Line, Inc.*, 979 F.2d 291 (2nd Cir. 1992).

Healy, supra; Guinn v. Electronic Data Systems, Case No. 91-1011 (4th Cir. October 15, 1991); *Amburgey v. Corhart Refractories Corp., Inc.,* 936 F.2d 805 (5th Cir. 1991); *McDonald v. Union Camp Corp.,* 898 F.2d 1155 (6th Cir. 1990); *Daugherty v. Taylor Brothers, Inc.,* 970 F.2d 348 (7th Cir. 1992); *Goetz, supra; Steckl v. Motorola Inc.,* 703 F.2d 392 (9th Cir. 1983); *Merrick v. Northern National Gas Co.,* 911 F.2d 426 (10th Cir. 1990); *Elrod v. Sears, Roebuck and Co.,* 939 F.2d 1466 (11th Cir. 1991). Thus, the Fifth Circuit's affirmance of the District Court's opinion in this case hardly poses a conflict among the Circuit Courts of Appeal.

Furthermore, Petitioner's bold proposition is directly contrary to this Court's interpretation of Rule 56 of the Federal Rules of Civil Procedure. In *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986), this Court cogently explained the operation of Rule 56 as follows:

> Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Id. at 322-23; *accord Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986).

Here, the trial court found, and the Fifth Circuit agreed, that Petitioner did not come forward with sufficient evidence to establish pretext in this case. Yet, Petitioner would have this Court command a jury trial every time a plaintiff simply suggested that the employer's articulated reasons were not credible. Rule 56 would be totally emasculated, however, if mere incantations regarding the employer's credibility would operate as a talisman to defeat an otherwise valid motion. This Court's decisions in *Catrett*, *Anderson*, and *Matsushita* do not sanction that result.

In sum, Petitioner's assertion that the issue of pretext may not properly be resolved on summary judgment is utterly without support in age discrimination case law and is directly contrary to this Court's interpretation of Rule 56. Therefore, Petitioner has not established that the Fifth Circuit erred, and no further review of this case is required.

II. The Court Of Appeals Properly Held That Petitioner Failed To Raise a Genuine Issue As To Whether EDS' Reason For Terminating Her Was Merely A Pretext For Age Discrimination.

Beyond asserting that the pretext issue may not properly be resolved on summary judgment as a general proposition, Petitioner insists that the lower courts incorrectly found that she had not presented sufficient evidence of pretext to warrant a jury trial in this case (*Petition for Writ of Certiorari*, pp. 15-16). Putting aside that simply reviewing the Fifth Circuit's findings regarding pretext in this case hardly presents an important question of federal law requiring this Court's review (*See* Sup. Ct. R. 10.1), Petitioner has fallen well short of demonstrating that the lower courts' decisions were improper in this case.

A. Petitioner may not rely on an argument not presented to the District Court in establishing grounds for review by this Court.

The gravamen of Petitioner's argument that the Court of Appeals erred in this case appears to be her assertion that a genuine issue of pretext may be gleaned from EDS' alleged failure to follow its internal transfer policy in this case (*Petition for Writ of Certiorari*, p. 16). EDS submits that Petitioner is foreclosed from relying on that argument because she did not raise the issue of EDS' internal transfer system to the District Court.

A time-honored, fundamental principle of appellate jurisprudence is that a reviewing court will not consider issues that were not brought before the trial court. The rationale for this well settled rule of law was succinctly explained by this Court in *Hormel v. Helvering*, 312 U.S. 552 (1941):

> Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; *it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.*

Id. at 556 (emphasis added).

As the Fifth Circuit properly held, that principle fully applies in this case. In her response to EDS' Motion for Summary Judgment, Petitioner did not contest or otherwise challenge EDS' statement in its Motion that Petitioner was ineligible to formally enter the internal transfer system (*See* R. Vol. I at 74, 221). Indeed, Petitioner's only mention of this fact was a passing reference in the "Background" section of her response and in her supporting Affidavit, where she matter-of-factly acknowledged that "Herbst strongly suggested that she look outside of EDS because she was not allowed to go on the Internal Openings and Placement list." (R. Vol. I at 204, 231 ¶19). These vague references to an apparently uncontested fact failed to put EDS on notice that Petitioner was alleging that Herbst's view of her eligibility to participate in the internal transfer system was indicative of age discrimination. Thus, under established precedent, Petitioner cannot obtain further review based on this evidence.

It also is critical to note that no injustice resulted from the Fifth Circuit's refusal to consider Petitioner's new argument. In her *Petition*, Petitioner fails to

acknowledge that this very issue was subject to a stipulation by the parties during pretrial proceedings before the District Court. Specifically, Joint Exhibit 3 of the parties' Joint Trial Exhibits (the admissibility of which Petitioner stipulated) submitted to the District Court on July 28, 1992, clearly shows that although Petitioner entered the EDS internal transfers system in early February, 1989, she remained in that system until May 8, 1989. Therefore, as Petitioner's new argument is based upon an entirely false premise, it would be manifestly unjust to permit her to raise it to secure this Court's review.

Finally, even if Petitioner's new argument was considered, it would not create a genuine issue of pretext. It is well established that "erroneous or even arbitrary" business decisions do not create a genuine issue of pretext absent evidence indicating that such decisions were tainted by discriminatory animus. *See e.g., Lawrence v. Chevron, USA, Inc.*, 885 F.2d 280, 285 (5th Cir. 1989); *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1162 (6th Cir. 1990). Here, there is no evidence to suggest that anyone in EDS' Internal Transfer Department harbored any unlawful animus toward Petitioner or that Herbst, an age contemporary of Petitioner, was motivated by Petitioner's age in concluding that she was not eligible to participate in the internal transfer system. Thus, Herbst's decision, even if based on an erroneous understanding as to Petitioner's internal transfer eligibility, does not evidence illegal age discrimination.

B. Petitioner has not otherwise established that the Court of Appeals erred.

Beyond her reliance on an issue not presented to the District Court, Petitioner asserts, in conclusory fashion, that other evidence establishes her right to a jury trial on the issue of pretext (*See Petition for Writ of Certiorari*, p. 16). However, the evidence cited by Petitioner is insufficient as a matter of law to overcome EDS' summary judgment motion.

A common thread that weaves throughout Petitioner's argument is her own subjective belief that she has fallen victim to age discrimination. It is well settled, however, that Petitioner's mere subjective belief is insufficient to rebut EDS' legitimate business reasons for terminating her employment. *See e.g., Little v. Republic Refining Co.*, 924 F.2d 93, 96 (5th Cir. 1991); *McDonald v. Union Camp Corp.*, 898 F.2d 1157, 1162 (6th Cir. 1990). Accordingly, Petitioner's mere conjecture that EDS accorded younger employees preferential treatment does not establish a material issue of fact as a matter of law. *Slaughter v. Allstate Ins. Co.*, 803 F.2d 857, 860 (5th Cir. 1986).

Likewise, Petitioner's reliance on her purported history of good performance also is insufficient to overcome EDS' motion. Courts have long recognized that employers are entitled to considerable deference in exercising business judgment. On that score, even poorly reasoned business decisions will not demonstrate a genuine issue of pretext without evidence that the decisions were unlawfully motivated. *See Billups v. Methodist Hospital of Chicago*, 922 F.2d 1300, 1304 (7th Cir. 1991); *Lawrence v. Chevron, USA, Inc.*, 885 F.2d

280, 285 (5th Cir. 1989).[8] Therefore, Petitioner's assertion that her performance was satisfactory is not sufficient to warrant full review of this case.

Further review also is not warranted based on the mere fact that Petitioner's Assistant I.E. position was eliminated while two other Assistant I.E.'s continued to be employed by EDS. Again, uncontroverted facts establish that the formal transition from production-type to implementation-type work and the attendant decrease in the need for the preparation of formal, final reports (a principal duty of the Assistant I.E. position) affected only the Insurance Team (*See* R. Vol. I at 104-05, 112-13, 118-19). The work of the Corporate and Finance Teams did not undergo a similar change. Consequently, they continued to need the services of their Assistant I.E.'s, Rosalynn Ford and Penny Welch (both of whom had more EDS seniority and higher performance ratings than Petitioner), as they had in previous years. Thus, as the record indicates that the Corporate and Finance Assistant I.E.'s were not similarly situated to Petitioner, EDS' retention of them following the reorganization of the Insurance Team does not establish pretext. *See Sherrod v. Sears, Roebuck & Co.*, 785 F.2d 1312 (5th Cir. 1986); *see also Mitchell v. Toledo Hospital*, 964 F.2d 577, 583 (6th Cir. 1992) (similarly situated employees must be similar in all respects).

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[8] It is important to note, however, that EDS hardly concedes that Petitioner's work performance was exemplary or that its decision to select her for layoff was a poor business decision. On the contrary, it is undisputed that the other Assistant I.E.'s (Welch and Ford) had more seniority and experience in that position than Petitioner. Moreover, at the time Herbst made the decision to terminate Petitioner, both Welch and Ford had performance ratings of "solid exceeds," two levels higher than Robb's "solid generally meets" rating (R. Vol. I at 112, 116, 118, 122; Vol. III at 149).

Finally, even if there could be any lingering doubt that Petitioner has fallen short of establishing a material question of fact on the issue of pretext, this Court's recent decision in *St. Mary's Honor Center v. Hicks*, _____ U.S. _____, 61 USLW 4782, 62 FEP Cases (BNA) 96 (June 25, 1993) is fatal to Petitioner's claim in this case. In *Hicks*, this Court clarified that the plaintiff must do more than merely establish that the employer's proffered reasons were unworthy of credence. Rather, the employee must show that the reason for the employer's action was illegal discrimination. *Id.* 62 FEP at 104. ("[I]t is not enough . . . to *disbelieve* the employer; the fact finder must *believe* the plaintiff's exploration of intentional discrimination").

While Petitioner has mentioned several grounds which she believes suggest that EDS' proffered reasons were untrue, she has not presented any evidence which even remotely links that decision to her age. Indeed, it is uncontested that Petitioner has never claimed that age-related remarks were ever made by EDS personnel (R. Vol. II at 369) and the record is devoid of any other evidence which would suggest age discrimination. Thus, Petitioner has not satisfied her burden under *Hicks* as a matter of law.

In sum, Petitioner has not established that the lower courts erred in granting EDS summary judgment in this case. Accordingly, no further review is required.

CONCLUSION

The Petitioner has set forth no reasons justifying further review of this matter. Petitioner's arguments have no basis in applicable law and fail to establish that the Fifth Circuit Court of Appeals incorrectly upheld summary judgment in this case. Accordingly, and for all of the foregoing reasons, EDS respectfully requests that the *Petition for Writ of Certiorari* be denied.

Respectfully submitted,

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APPENDIX

Guinn v. Electronic Data Systems, Case No. 91-1011 (4th Cir. October 15, 1991)

[1] No. 91-1011

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CAROL GUINN,
Plaintiff-Appellant,

v.

ELECTRONIC DATA SYSTEMS, INCORPORATED,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of West Virginia,
at Parkersburg. Charles H. Haden, II,
Chief District Judge.
(CA-90-178-A)

Argued: June 6, 1991

Decided: October 15, 1991

Before RUSSELL and SPROUSE, Circuit Judges, and
MERHIGE, Senior United States District Judge
for the Eastern District of Virginia,
sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Leman Walton Auvil, PYLES & AUVIL, Parkersburg, West Virginia, for Appellant. Lee J. Hutton, DUVIN, CAHN & BARNARD, Cleveland, Ohio, for Appellee. ON BRIEF: Charles A. Linn, DUVIN, CAHN & BARNARD, Cleveland, Ohio; Robert W. Friend, Sr., Parkersburg, West Virginia, for Appellee.

[2] Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6

OPINION

PER CURIAM:

Carol Guinn appeals from a summary judgment granted to Electronic Data Systems, Inc. (EDS) in her action brought pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621 *et seq.* and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* Guinn claims that EDS unlawfully discharged her because she was 59 years old and female. We affirm.

Guinn was employed by EDS and its predecessors for twenty-three years in Belpre, Ohio. EDS performs data processing services, such as processing checks for banks, on a nationwide basis. In her complaint, Guinn described herself as an executive secretary/bookkeeper and indicated that she performed a variety of tasks, primarily as a general assistant to the account manager of the Ohio Valley operation. Beginning in 1985, Guinn's responsibilities were diminished as her duties were reassigned to others or absorbed by the corporate headquarters of the companies that acquired the Ohio Valley operation.

Deposition evidence indicates that soon after acquiring the Ohio Valley operation, EDS determined that its operations were unprofitable. Because the division was losing between one and two million dollars a year, EDS instituted procedures to reduce expenses. The regional accounts manager instructed Guinn's local superior to reduce the size of its work force by ten percent and to suggest positions for elimination. This required the termination of four employees from the staff of approximately forty. Consultation among the Ohio Valley operations supervisors failed to identify all four positions to be eliminated and, as a consequence, the regional account executive selected four individuals for termination. Guinn, who was 59 years of age at the time, was one of the four. Subsequently, Guinn filed suit in the United States District Court for the Southern District of West Virginia, alleging that EDS violated her rights under ADEA and Title VII of the Civil Rights Act of 1964.

[3] Ultimately, Guinn must prove that "but for" her age or sex EDS would not have discharged her. Plaintiffs can accomplish this through traditional methods of proof, that is, by relevant and probative direct or indirect evidence of discrimination. *Goldberg v. B. Green & Co.*, 836 F.2d 845, 847 (4th Cir. 1988); *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 239 (4th Cir. 1982). We also permit ADEA plaintiffs to use the three-stage scheme of proof devised by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). *See Herold v. Hajoca Corp.*, 864 F.2d 317, 319 (4th Cir. 1988), *cert. denied*, 490 U.S. 1107 (1989); *E.E.O.C. v. Western Electric Co.*, 713 F.2d 1011, 1014-15 (4th Cir. 1983); *McDaniel v. Mead Corp.*, 622 F.Supp. 351 (W.D. Va. 1985) *aff'd*, 818 F.2d 861 (4th Cir. 1987).

Under the *McDonnell-Douglas* scheme, as adapted by *Burdine,* the plaintiff establishes a prima facie case of discrimination by satisfying a four-prong test. The prima facie case establishes a rebuttable presumption of unlawful discrimination and shifts the burden of producing evidence to the employer. At this stage, the employer must articulate some legitimate non-discriminatory reason for its action. At the final stage, the employee bears the burden of demonstrating that those reasons are untrue or a pretext for discrimination. *Burdine,* 450 U.S. at 254-55; *Herold,* 864 F.2d at 319; *Western Electric,* 713 F.2d at 1014.

We agree with the district court that even had Guinn established a prima facie case, she failed to present sufficient evidence to create an inference that EDS' legitimate non-discriminatory reason for the action was a pretext for discrimination.

EDS met its obligation to produce evidence of a legitimate non-discriminatory reason for its action. EDS states that it terminated Guinn and three other employees in an effort to reduce expenses by reducing its work force. EDS based its choice of which employees to terminate on an age and sex neutral standard: it would discharge those employees whose departure would have a minimal impact on its ability to provide services to its customers.

Guinn attempts to rebut this by pointing to the fact that all four discharged employees were over the age of 45. We agree with the dis-[4]trict court's conclusion that this fact, standing alone, does not establish a genuine issue for trial. Guinn also argues that EDS failed to transfer her to the position of "fine sorter" at Belpre, but that EDS later transferred two 35 year old male employees to that position from another facility. She

does not, however, offer any evidence to counter EDS' explanation that the position was simply not vacant at the time she was terminated.

In addition, Guinn provides no evidence to indicate that she was discharged because she is a woman. We agree with the district court that her failure to support this claim means there is no triable issue of sex discrimination.

Under Fed. R. Civ. P. 56, summary judgment is granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The moving party, EDS, bears the initial burden of showing the absence of a genuine issue concerning any material fact. *Adikes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Once that burden is met, the nonmoving party, Guinn, must "establish the existence of an element essential to that party's case, and one which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is appropriate in age and sex discrimination cases when the plaintiff does not produce sufficient evidence to create an inference of discriminatory motive to rebut the employer's articulated non-discriminatory reason. *McDaniel*, 622 F. Supp. at 361.

We agree with the district court that the summary judgment record reflects that over the final two years of her employment Guinn's duties had diminished until her time was not fully occupied and her dismissal would have little or no impact on the delivery of customer services and that her termination was based on legitimate non-discriminatory business reasons rather than on either age or sex considerations.

In view of this, the opinion of the district court is affirmed.

AFFIRMED